UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE MOTION FOR DECLARATORY JUDGMENT OF GOOGLE INC.'S FIRST AMENDMENT RIGHT TO PUBLISH AGGREGATE INFORMATION ABOUT FISA ORDERS.	Docket No. Misc. 13-03
IN RE MOTION TO DISCLOSE AGGREGATE DATA REGARDING FISA ORDERS	Docket No. Misc. 13-04

BRIEF OF FIRST AMENDMENT COALITION, AMERICAN CIVIL LIBERTIES UNION, CENTER FOR DEMOCRACY AND TECHNOLOGY, ELECTRONIC FRONTIER FOUNDATION, AND TECHFREEDOM AS *AMICI CURIAE* IN SUPPORT OF THE MOTIONS FOR DECLARATORY JUDGMENT

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STATEMENT OF AMICI

Amici are public interest organizations dedicated to the preservation of civil liberties. They respectfully submit this brief to set forth their views as to the special impact of the First Amendment's protection of free expression on the resolution of the motions filed by Google, Inc. ("Google") and Microsoft Corporation ("Microsoft") seeking declaratory judgments confirming their ability to disclose limited numerical information in aggregate form as to requests that each may have received from the government pursuant to the Foreign Intelligence Surveillance Act ("FISA").

DESCRIPTION OF THE AMICI

Amicus First Amendment Coalition ("FAC") is a section 501(C)(3) nonprofit organization dedicated to First Amendment freedoms—primarily freedom of speech and the press—and government transparency. Founded in 1988, FAC works to enhance and protect these rights through a free legal consultation service, educational and information services, public advocacy of various kinds, and litigation, including the initiation of litigation in its own name and the filing of briefs *amicus curiae*. FAC receives support from foundations and from its members, who include individuals and corporations.

Amicus American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil-rights laws. Since its founding in 1920, the ACLU has appeared before the federal courts as direct counsel and as *amicus curiae* in numerous cases involving the First Amendment. It has also appeared before this Court on several occasions.

Amicus Center for Democracy & Technology ("CDT") is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the Internet, other com-

munications networks, and associated technologies. CDT represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

Amicus Electronic Frontier Foundation ("EFF") is a member-supported organization dedicated to protecting civil liberties in the digital world. Founded in 1990, EFF fights to ensure that the rights and freedoms we enjoy are enhanced as our use of technology grows. EFF has filed actions and has appeared before this Court and also advocates for greater transparency about government requests for user information.

Amicus TechFreedom is a nonprofit, nonpartisan public policy think tank. Its work on a wide range of information technology policy issues rests on a belief that technology enhances freedom and freedom enhances technology. TechFreedom has been involved in debates over both free speech and privacy and believes that restrictions on the flow of information, whether to protect national security or to achieve some other state interest, must be reconciled with the speech interests burdened by regulation.

All parties have consented to the filing of this brief *amici curiae*.[1]

ARGUMENT

A. THE FIRST AMENDMENT IMPOSES A HEAVY BURDEN ON ANY EFFORT TO BAR DISCLOSURE HERE

The Google and Microsoft motions arise in the context of an ongoing national debate about the nature and extent of government surveillance intended to protect national security. There is widespread national interest in the topic, *compare, e.g.*, Editorial, *President Obama's Dragnet*, N.Y. TIMES, June 7, 2013, *with* Clarence Page, *Secrecy Scandal? Not So Much, Really*,

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[1] *Amici* certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

CHICAGO TRIBUNE, June 12, 2013, which is reflected in acknowledgment by the highest officials of the Executive branch and Congressional leaders of both parties that a robust national debate about that subject is appropriate.[2] The President has emphasized the need for such a debate: "I welcome this debate. And I think it's healthy for our democracy. I think it's a sign of maturity, because probably five years ago, six years ago, we might not have been having this debate." Statement by the President, Office of the Press Secretary (June 7, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/07/statement-president. Similarly Republican Senator Charles E. Grassley has observed that "open and transparent discussion of these programs is the only way that the American people will have confidence in what their government's doing." *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (June 19, 2013) (stmt. of Sen. Charles E. Grassley).

Yet even basic facts of central relevance in this debate are unknown and currently unknowable to the public, facts ranging from how extensive the government surveillance programs are to how many users or accounts they affect. It is against this backdrop that Google and Microsoft now seek to disclose (1) the number of FISA requests that each may have received and (2) the number of users or accounts encompassed within any such requests. Google and Microsoft have each filed motions seeking a declaration from this Court that they are not prohibited

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[2] *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (June 19, 2013) (stmt. of Sen. Leahy) ("We have to have an open debate about the efficacy of these tools, particularly, in light of the Boston marathon bombing in April, not only [] how we collect them, but what we do with it once it's [collected]."); *Oversight of the Federal Bureau of Investigation (FBI): Hearing Before the H. Judiciary Comm.*, 113th Cong. 47 (June 13, 2013) (stmt. of Rep. Jeffries) ("But it is clear that he has become a lightning rod that has sparked what I think is a very important debate in this country that we in the Congress should have as to the proper balance between legitimately held security concerns and concerns for privacy and liberty, which are essential to the preservation of our democracy."); Matthew DeLuca & Kasie Hunt, *NSA Snooping Has Foiled Multiple Terror Plots: Feinstein*, NBC NEWS, June 6, 2013, *available at* http://usnews.nbcnews.com/_news/2013/06/06/18796204-nsa-snooping-has-foiled-multiple-terror-plots-feinstein?lite ("We are always open to changes. But that doesn't mean there will be any. It does mean that we will look at any ideas, any thoughts, and we do this on everything." (quoting Sen. Feinstein)).

from doing so. *See* Br. at 4, *In re Motion for Declaratory Judgment of Google Inc.'s First Amendment Right to Publish Aggregate Information About FISA Orders*, No. Misc. 13-03 (June 18, 2013) ("Google Br."); Br. at 4, *In re Motion to Disclose Aggregate Data Regarding FISA Orders*, No. Misc. 13-04 (June 19, 2013) ("Microsoft Br."). Both companies state that they would publish this data in a way that would not allow "any particular individual user to infer that he or she had been targeted." Microsoft Br. at 5; *see also* Google Br. at 4.

Amici submit this brief in support of those motions. Google asserts that "no applicable law or regulation" bars it from making the disclosures it seeks to make. *See* Google Br. at 4; *see also* Microsoft Br. at 4. *Amici* also are not aware of any such bar but recognize that they have more limited information as to the procedures and rules applicable to the applications of the government and the rules of this Court and so do not address that issue as such. Instead, we aim (1) to highlight the fundamental First Amendment interests implicated by any rule, whatever its origin, that prohibits the disclosures that Google and Microsoft seek to make here; and (2) to emphasize the very heavy burden that the proponent of any such rule would have to sustain in light of the First Amendment's requirements.

Any rule precluding disclosure as to what a party itself is asked to do bears an extremely high burden of justification under broad principles protecting free expression even where the non-disclosure might be sought in service of national security. And those principles have, in fact, been applied in the closely related "National Security Letter" context to determine that even an explicit statutory prohibition on far more specific disclosures than those at issue here was unconstitutional. We write to put both these general principles and their specific application in this context before this Court. *Amici* believe that these First Amendment principles, when applied to the limited proposed disclosures—disclosures central to an ongoing national debate—argue strongly for the grant of the declaratory relief being sought.

In making this argument, we are not insensitive to concerns for national security. But even those important concerns do not easily, let alone routinely, trump the First Amendment. *See, e.g.*, *United States* v. *Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring) ("The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words 'national security'"). As Judge Gurfein recognized many years ago in his ruling in the Pentagon Papers case, "[t]he security of the Nation is not at the ramparts alone [but] also lies in the value of our free institutions." *United States* v. *New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971).

The "free institution" at risk here is nothing less than the guarantee of free expression contained in the First Amendment. The expression at issue on the present motions—speech by Google and Microsoft about their own conduct in responding to any government requests—is central to a significant political debate at the heart of self-government. It implicates the most fundamental First Amendment values and should yield only to a government interest of the highest order subjected to the most searching judicial inquiry. The government's burden is a heavy one, as both broad principles of First Amendment law and narrower decisions issued in strikingly similar national security contexts make clear.

The First Amendment embodies "a profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), and that Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes," *Roth* v. *United States*, 354 U.S. 476, 484 (1957). Nowhere is this commitment more pronounced than in the context of a national public debate on pressing political issues:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.

Citizens United v. *Federal Election Commission,* 558 U.S. 310, 339 (2010) (citation omitted); *see also Garrison* v. *State of Louisiana*, 379 U.S. 64, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government.").

Even scholars who have advanced the most restrictive view of the scope of the First Amendment by questioning whether it should protect artistic speech, have strongly affirmed that speech about governmental interaction with the citizenry is at the heart of what the Amendment protects. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-28 (1971) ("The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative."). And, as the Supreme Court has recognized, there is "practically universal agreement" that the First Amendment's protections are at their zenith when applied to "the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1971). Here, in seeking to provide the public with information about the number of government requests received and the number of affected subscriber accounts, Google and Microsoft each seeks to engage in speech that addresses governmental affairs in the most profound way that any citizen can: by describing their own interaction with the government process that is the subject of the national debate. Such speech, relating to the "structures and forms of government" and "the manner in which government is operated or should be operated," is at the very core of the First Amendment, *e.g.*, *Mills*, 384 U.S. at 218; *see also Roth*, 354 U.S. at 484, and thus occupies "the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick* v. *Myers*, 461 U.S. 138, 145 (1983)).

This speech also implicates another fundamental aspect of the First Amendment, the protection for self-expression. *E.g.*, *Consolidated Edison Co. of New York, Inc.* v. *Public Service Commission of New York*, 447 U.S. 530, 534 n.2 (1980); *First National Bank of Boston* v. *Bellot-*

ti, 435 U.S. 765, 783 (1978). That interest reflects the principle at the very foundation of the First Amendment that freedom of expression is tied to freedom of thought and to a speaker's very identity. *E.g.*, *Procunier* v. *Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) (self-expression "is an integral part of the development of ideas and a sense of identity"); *Police Department of City of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972) (First Amendment "assure[s] self-fulfillment for each individual" by guaranteeing the "right to express any thought, free from government censorship"); *see also* Zechariah Chafee Jr., FREE SPEECH IN THE UNITED STATES 33 (1967); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963). The speech at issue here is expression about the speakers' own actions, actions taken under government compulsion for which the speakers have been publicly criticized[3] and that they now seek to explain and to defend.[4] Banning such speech strikes at the heart of the First Amendment's preservation of speech. It is antithetical to the First Amendment to restrict the ability of a person to mount a defense against public accusations by responding with speech setting forth the truth about one's own actions.[5]

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[3] *See, e.g.*, Caleb Garling, *Firms Seek to Explain to Users; Tech Surveillance; Some Companies Urge Government Agencies to Allow Transparency*, SAN FRANCISCO CHRONICLE, June 18, 2013, at D1 ("But it is clear that some Internet users have come to view these tech giants as proxy spies as a result of their assumed compliance."); Jessica Guynn, *Tech Firms Try to Regain Trust; Apple is the Latest to Try to Reassure Public That It Didn't Give U.S. Direct Access to Data*, LOS ANGELES TIMES, June 18, 2013, at B2 ("Scrutiny of the role technology companies played in a clandestine government surveillance program is intensifying, and nowhere have the revelations that companies turned over users' personal information been more unsettling than in Silicon Valley.").

[4] The element of government compulsion here distinguishes this situation from that in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32-34 (1984), and *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam), where the speaker's *voluntary* participation in a government process that restricted his ability to disseminate materials obtained through that process resulted in diminished First Amendment concerns, *see United States* v. *Aguilar*, 515 U.S. 593, 606 (1995) (distinguishing such cases from those involving "efforts to impose [speech] restrictions on *unwilling* members of the public" (emphasis added)).

[5] Any prohibition on the proposed numerical disclosure would bar truthful speech about a matter of profound national significance and is therefore particularly pernicious given our commitment to protect truthful speech against government restrictions. *See, e.g.*, *Bartnicki* v. *Vopper*, 532 U.S. 514, 533-34 (2001) (noting that challenged measure "implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern"); *cf. The Florida Star* v. *B.J.F.*,

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The Supreme Court has recognized the special concern that attends prohibitions on speaking about one's own experiences. *See, e.g.*, *Butterworth* v. *Smith*, 494 U.S. 624 (1990) (First Amendment violated by rule prohibiting witness publicly disclosing his own prior grand jury testimony). Indeed Rule 6(e) of the Federal Rules of Criminal Procedure makes a pointed distinction between the general secrecy imposed on participants in the grand jury process and the witnesses before such grand jury, who are not subject to the general secrecy rule. In *Butterworth*, the Supreme Court recognized the importance of a witness' "ability to make a truthful public statement" notwithstanding the longstanding recognition of societal interest in grand jury secrecy. *Id* at 635. Lower courts have frequently struck down orders precluding banks and other institutions from disclosing that the institution had received a subpoena for a customer's records. *See, e.g.*, *In re Grand Jury Proceedings*, 814 F.2d 61 (1st Cir. 1987); *In re Grand Jury Subpoena*, 574 F. Supp. 85 (S.D.N.Y. 1983). The point is not that a non-disclosure rule as to governmental inquiries is precluded in all circumstances, but rather that courts have recognized that First Amendment interests must be weighed very heavily when the government seeks to ban truthful disclosure of information concerning a person's own actions even where other significant societal concerns are at stake. At the least, the government must make a substantial and particularized showing to justify any such ban. *See In re Grand Jury Proceedings*, 574 F. Supp. at 86 (recognizing "the important freedoms, including speech and association" at issue and rejecting request that bank be barred from disclosing to its customer fact of subpoena because of government's failure to make "particularized showing of need for secrecy").

Any attempt to overcome First Amendment concerns implicated by the speech at issue here would have to be subjected to the most searching scrutiny. First, the nature of the re-

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491 U.S. 524, 533-34 (1989) (discussing constitutional protection afforded for dissemination of lawfully obtained truthful information concerning matters of public significance).

strictions is that of a prior restraint.[6] Such restraint is "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976), and would carry a "heavy presumption against its constitutional validity," *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (per curiam) (quotation omitted). Second, even if not a prior restriction, any bar focused on disclosure would be based on the speech's content and, therefore, subject to strict scrutiny, which it could survive only if it were narrowly tailored to promote a compelling government interest in the least restrictive means available. *See, e.g.*, *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

The institutional role of the judiciary also argues strongly for the most rigorous vetting of any proposed bar to disclosure here. That role is relevant in two distinct ways: first, in the interest of the citizenry in observing the workings of the judicial system; and second, in the crucial role that the judiciary has historically played in weighing the claims of the other branches of government against each other and against the interests of the citizenry at large.

As the Supreme Court has recognized in setting out the constitutional concerns supporting open trials, the public's interest in seeing the government process at work, including the judicial process, is a fundamental element of our heritage. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 572 (1980). *Amici* recognize that this Court routinely deals with sensitive information. But when, as with the current applications, disclosure is sought that can bring some transparency to the process and inform the national debate, it is imperative for reasons relating to process as well as the ultimate

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[6] "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander* v. *United States*, 509 U.S. 544, 550 (1993) (quotations omitted).

substantive decision, that any effort to bar disclosure require the most extraordinary showing of potential harm if it is even to be entertained.[7]

And this Court's role in assessing any such effort is crucial. The judiciary's role is that of the "great bulwark of public liberty" in our system of separated powers. *See* 3 The Miscellaneous Writings of Justice Story 209 (ed. William M. Story 1852). That role is undiminished even when those "public liberties" are set against interests of such undeniable exigence as national security. *See Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) ("[C]oncerns of national security and foreign relations do not warrant abdication of the judicial role" and courts must "not defer to the Government's reading of the First Amendment, even when such interests are at stake."); *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check . . . when it comes to the rights of the Nation's citizens.").[8] Indeed, the judiciary's role as bulwark is all the more significant in a context such as this, where proceedings are essentially *ex parte* and where information about those proceedings is of particular value to the public. The broad scope of First Amendment jurisprudence makes clear the rigorous standard that must be required of any claim that would preclude disclosure here. And, as discussed below, these principles have been applied in a specific context closely akin to the present one and held to impose just such a requirement of specific factual proof.

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[7] As the *Richmond Newspapers* decision also recognized, "[t]he First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." 448 U.S. at 575-76 (citation omitted). This public interest in "the stock of information" provides a separate First Amendment interest at issue here.

[8] Indeed, the role as arbiter assumes still greater significance when fundamental constitutional guarantees are tested in times of even the gravest insecurity. *E.g.*, *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 425-26 (1934) (constitutional rights "were determined in the light of emergency and they are not altered by emergency[;] even the war power does not remove constitutional limitations safeguarding essential liberties").

B. FIRST AMENDMENT PRINCIPLES HAVE BARRED OVERBROAD NON-DISCLOSURE RULES IN THE CONTEXT OF NATIONAL SECURITY

The broad principles described in the preceding section animated the decision in *John Doe, Inc.* v. *Mukasey*, 549 F.3d 861 (2d Cir. 2008), which sustained a First Amendment challenge to portions of the Electronic Communication Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986), as amended by the U.S.A. PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). The decision held unconstitutional a blanket prohibition on the recipient of a National Security Letter disclosing information about that letter. The Second Circuit held that a perceived threat to national security could justify restraining the speech there at issue only if the government articulated a sound basis for its judgment to that effect. *See id.* at 881-82. To do otherwise would "cast Article III judges in the role of petty functionaries, . . . stripped of capacity to evaluate independently whether the executive's decision is correct." *Id.* at 881 (quoting *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 426 (1995)). As that court explained:

> The fiat of a governmental official, though senior in rank and doubtless honorable in the execution of official duties, cannot displace the judicial obligation to enforce constitutional requirements. "Under no circumstances should the Judiciary become the handmaiden of the Executive."

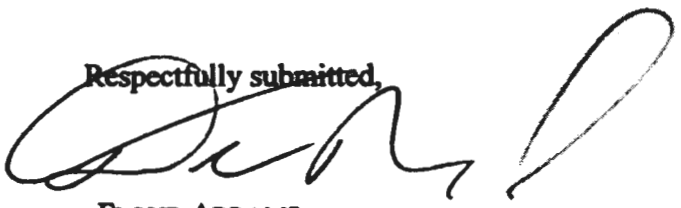
Id. at 882-83 (quoting *United States* v. *Smith*, 899 F.2d 564, 569 (6th Cir.1990)). A similar appreciation of First Amendment concerns informed the recent decision in *In re National Security Letter*, No. C 11-02173 (SI), 2013 WL 1095417 (N.D. Cal. Mar. 14, 2013), where the court perceived no justification for a general prohibition on disclosure of the mere fact of receiving a National Security Letter, *see id.* at *10-11, and concluded that the same statutes as were at issue in *Mukasey* violated the First Amendment. Each of those cases involved challenges to disclosures as to the letters themselves, surely a potentially more revealing disclosure than revelation of numerical totals.

The same core First Amendment principles reflected in those decisions apply with at least equal force to the disclosures at issue here and counsel that any restriction of that speech can be sustained only if such restriction survives the most searching judicial review of a detailed presentation of facts supporting such non-disclosure. *Amici* find it difficult to comprehend how national security could be threatened by the disclosures that Google and Microsoft seek to make here. *Amici* have no doubt, however, that any restriction premised on the suggestion of such alleged threat must be subjected to the strictest of scrutiny and the proponents of any such restriction must overcome the very highest level of First Amendment protection.

* * *

Pursuant to FISC Rule of Procedure 7(h)(1), Attorneys for the *Amici* certify that each of the undersigned Attorneys for *Amici* is a licensed attorney and a member, in good standing, of the bar of United States District Court for the Southern District of New York. Pursuant to FISC Rule of Procedure 7(i), Attorneys for the *Amici* further certify that the undersigned do not currently hold a security clearance.

Respectfully submitted,



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